No. 482

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

NEW YORK LIFE INSURANCE COMPANY, a New York Corporation,
Petitioner,

vs.

BEULAH C. CALHOUN,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR A WRIT OF CERTIORARI.

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Cases Cited.

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STATEMENT.

(a) The history of the litigation as to suits brought and trials, judgments, appeals and affirmances of judgments and the respective dates on which those things occurred is correctly set forth in petitioner's "Summary Statement of the Matter Involved."

However, the question submitted to, and decided by, the Court of Appeals in the law case was not whether there was vexatious refusal to pay "as a matter of law" (as stated in paragraph 2 on page 3 of petitioner's "Summary Statement of the Matter Involved"), but it was whether there was sufficient evidence tending to show such vexatious refusal to entitle the plaintiff in the law case to have that issue submitted to the jury under proper instructions, and whether the case had been fairly tried.

(b) 1. The said decision of the Court of Appeals on a question of local law is in no wise in conflict with the applicable local decisions of the Supreme Court of Missouri, but is in perfect harmony therewith.

2. The facts shown were such as made it the duty of the trial court in the law case to submit to the jury, by proper instructions, the question of vexatious refusal, not to give a peremptory instruction to find for or against either party on that issue.

3. The Court of Appeals properly held in the law case that, under the Missouri decisions, the issue was one to be decided by a jury, and not one to be ruled by the Court as a matter of law. There is no conflict between that ruling by the Court of Appeals and any controlling decision of the Supreme Court of Missouri.

BRIEF OPPOSING GRANTING OF WRIT.

I.

The opinions of the Court of Appeals are properly identified and cited by petitioner.

II.

The **right** of this Court to grant a writ of certiorari in **any** case pending in any Court of Appeals of the United States is clear under Section 240 (a) of the Judicial Code; but it is purely **discretionary**, not **obligatory**; the wording is **"may grant"**—not **"must grant."**

III.

STATEMENT OF THE CASE.

We agree that no further statement than that already given by petitioner, as supplemented by respondent's statement, is necessary.

IV.

The holding of the Court of Appeals that plaintiff had made a submissible case on the question of "vexatious delay" was correct and in accordance with the decisions of the Supreme Court of Missouri on that subject.

V.

ARGUMENT.

The sole question in the law case was as stated by petitioner under this point, and Missouri law is binding on the courts of the United States, the Court of Appeals was bound by it, and this Court is bound by it. The applicable

Missouri statute is correctly copied on page 7 of petitioner's petition and brief.

The holdings of the Missouri Supreme Court on the question as to whether there is a bona fide conflict of fact or a question of law about which lawyers might well differ **up to the time of trial all refer to the trial before the jury in a law case,** not to a trial in an equity case preliminary to a law case, as in this litigation; for the jury trial is the first one wherein that question could arise. It could not have arisen in the equity case, for that had for its sole purpose the cancellation of the insurance policy. That case resulted in the trial court in defeat of the insurance company, and the trial judge who tried the equity case found as a fact that insured never had had any hemorrhage before he made application for the insurance policy in question; and all the evidence, including that offered by the insurance company itself, so showed. While a physician who had treated insured had testified in a deposition before the trial of the equity case that the insured had had a hemorrhage some months before the date of the application for the policy, he testified at the trial of the equity case that he had been mistaken in his testimony in the deposition concerning the date of the first hemorrhage, which insured had, and he testified at the trial of the equity case that he had refreshed his memory since he had given his deposition by consulting a record which he had not examined before his deposition was taken, and he had found that the date given by him in his deposition as the date of the first hemorrhage was an error, and that the first hemorrhage occurred at a date approximately **three months after the application for insurance was made** (Rec. Eq. 63-68). All the evidence on the subject showed that no hemorrhage had occurred before the policy was issued or the application was made. The medical testimony offered by the insurance company itself showed that the condition which was

solely responsible for the death of insured was known as aneurysmal varices, one of the parts of the blood vessel involved in such condition in the lower third of insured's esophagus having broken open and caused a fatal hemorrhage on December 1, 1935, approximately one year and ten months after insured applied for the policy. All of the medical testimony showed that the insured could not possibly have known of the existence of the aneurysmal varices of the esophagus at the time when he made application for the policy.

(a) **No conflict of fact.**

In view of the foregoing, there was no conflict of fact at the trial of the equity case. Every particle of the evidence was against the insurance company, including that offered by it as well as that offered by the widow.

The foregoing answers the contention about "conflict of fact," even at the trial of the equity case. There was no conflict even then.

All of said facts were known to the insurance company from the date of the trial of the equity case (September 24, 1936, Rec. Eq. p. 28), approximately ten months before the District Court decided against the insurance company in the equity case, and over a year before the trial of the law case before a jury. All that time petitioner knew that it had no evidence to sustain its allegations of fraudulent misrepresentations by insured in his application for the policy. Whatever it may have **believed** before the trial of the equity suit in September, 1936, it learned then that **it had no proof of a single fact to sustain its allegations of fraud.** We repeat, only at the trial of the law case could the question of vexatious refusal to pay be involved; hence the "time of trial" referred to relates to the **jury** trial, and for over a year before that trial the petitioner knew there could be no conflict in the facts at such trial. Therefore,

petitioner cannot claim that it had reasonable ground to believe when it went into the **jury** trial that there would be a conflict of fact at such trial.

No Dispute of Law as to Which Lawyers Might Entertain Reasonable Difference of Opinion on the Eve of Trial of Either the Equity Case or the Jury Case.

(b) The case of Kirk v. Metropolian Life Ins. Co., 336 Mo. 768, 81 S. W. (2) 333, so strongly urged by petitioner as an authority in its favor from beginning to end in this litigation, was never an authority in its favor in this case, for the reason that the Kirk case involved right of recovery on a policy of insurance which contained what is known as the "Sound Health Provision," whereby it was provided that the policy should not be effective until delivered while the insured was alive "and in sound bodily health." No less than eight times in its opinion the Supreme Court of Missouri mentioned that clause. It held that it was necessary, under that provision, for insured "to be, not merely believe herself to be, in sound bodily health," and since it was learned later that she had incipient tuberculosis when the policy was delivered, and died of tuberculosis, there could be no recovery under the policy.

The policy here involved had no such provision anywhere in it. (The policy is set forth in full in the record in the equity case, pages 29 to 33.) That one fact has always distinguished this case from the Kirk case.

The equity case was tried in the District Court and decided by it before this Court decided the case of Erie Railroad Co. v. Tompkins, 304 U. S. 64.

If the trial court, in deciding the equity case, failed to see the distinction between the case at bar and the Kirk case, being misled by counsel for petitioner's continual arguing about that case, that made no difference, for the

trial court reached the right conclusion, namely, the policy should not be canceled. The Court of Appeals reached the same conclusion, for the reason that through carelessness or ignorance petitioner wrote its question in the application for the policy so that an ambiguity existed, and that ambiguity was resolved against petitioner and in favor of insured and his widow, and it being so resolved, it was held there was no misrepresentation made, either fraudulently or innocently, by insured when he answered that question.

That holding was in accord with all Missouri decisions on the subject, as well as decisions of the United States courts and courts of many other jurisdictions.

Mathews v. Modern Woodmen, 236 Mo. 326, l. c. 342, 139 S. W. 151, l. c. 155;
Renshaw v. Mo. State Fire and Marine Ins. Co., 103 Mo. 505, 15 S. W. 945;
Connecticut Life Ins. Co. v. Union Tr. Co., 112 U. S. 250;
Day v. Equitable Life Assur. Society of U. S., 83 Fed. (2d) 147;
Northwestern Life Ins. Co. v. Banning, 63 Fed. (2d) 736.

It has always been the law of Missouri that, absent the "sound health provision" (not involved here), misrepresentations will not avoid a policy unless the applicant knew they were false or was charged with such knowledge.

State ex rel. v. Allen, 310 Mo. 378, 276 S. W. 877;
Grand Lodge v. Massachusetts Bond & Ins. Co., 324 Mo. 938, 25 S. W. (2d) 783;
State ex rel. v. Purl, 228 Mo. 1, l. c. 22-24, 128 S. W. 96.

Under the law, as correctly declared by the Court of Appeals, inasmuch as there was an ambiguity in the wording of the question in the application concerning disease of the blood vessels, in that the insured was asked, "Have you

ever suffered from any disease of the blood vessels?'' and since all the way through the case it had been alleged that he had suffered from such disease of the blood vessels, and inasmuch as the medical evidence offered by the insurance company itself showed he had not experienced any suffering on account of such disease of the blood vessels, even if Dr. Seabold had, at the trial of the equity case, testified, as he had in his deposition, that the first hemorrhage occurred before the application for the policy was made, that would not have furnished any testimony that was beneficial to the insurance company in support of its allegation that the insured had suffered from a disease of the blood vessels.

But not only did Dr. Seabold testify at the trial that he had been mistaken in his deposition in fixing the date of the first hemorrhage as November, 1933, which was before the application was made for insurance in January, 1934, and that upon reflection and refreshing his memory he found the first hemorrhage occurred three months after the date of the application, but there was testimony of three witnesses from the household of the insured which made it perfectly clear that there had been no hemorrhage before the date of the filing of the application.

As to the Kirk case, let us call the Court's attention to the fact that the case of DeValpine v. New York Life Insurance Co., 105 S. W. (2d) 977, was decided by the St. Louis Court of Appeals on June 1, 1937. In that decision the St. Louis Court of Appeals discussed fully the holding in the Kirk case and demonstrated that it was based entirely upon the sound health provision in the policy therein involved. The same counsel who represent the petitioner and have represented it throughout this litigation represented it also in the DeValpine case. If the decision of the St. Louis Court of Appeals was contrary to the decision in the Kirk case by which it was bound then, this same insurance company could have applied to the Supreme Court of Missouri

and obtained a writ of certiorari to reverse the judgment of the St. Louis Court of Appeals because of conflict between its holding and that of the Supreme Court in the Kirk case. But no such thing was done. It does not look like good faith on the part of the insurance company thereafter to insist that the decision in the Kirk case did not mean what the St. Louis Court of Appeals said it meant.

So there was no "conflict of law."

The Missouri law as declared by the Supreme Court of that state permits the jury in such a case as that here involved to arrive at the conclusion that there was vexatious refusal to pay by a survey of all the facts and circumstances of the case.

Curtis v. Indemnity Co. of America, 327 Mo. 350, 37 S. W. (2d) 616;
State ex rel. Gott v. Fidelity & Deposit Co., 317 Mo. 1078, 1095, 298 S. W. 83;
Block v. Fidelity & Guaranty Co., 316 Mo. 278, 305, 290 S. W. 429;
State ex rel. Ins. Co. v. Trimble, 322 Mo. 1236, 18 S. W. (2d) 21, 22;
Fay v. Ins. Co., 268 Mo. 373, 390, 187 S. W. 861.

So surveying the case, the jury could find the following facts tending clearly to show that the insurance company was not acting in good faith in failing to make prompt payment of the loss under its policy, but was deliberately obstructing the plaintiff in her attempts to collect what was justly due her:

1. The insurance company did not even acknowledge receipt of proofs of death sent to it in behalf of the widow.

2. It did not make a fair investigation of the facts before filing the equity suit, but rushed into court and instituted that suit when it still had twenty days for further investigation before the policy would become incontestible. It

failed to interview the widow or any witness whom she might name from whom it could learn the facts which might verify or contradict some information which it claimed to have tending to show that the insured suffered a hemorrhage before he applied for the policy. It could easily have learned then that the physician who so informed the insurance company was mistaken as to the date of the first hemorrhage.

3. In the original petition, filed in the District Court by the insurance company in the equity suit (Rec. Eq. pp. 121-124), it charged that insured fraudulently concealed certain diseases which it alleged contributed to cause his death, and all the way through that petition and the amended petition it alleged that the existence of those diseases was known to Mr. Calhoun and fraudulently concealed from the insurance company for the purpose of defrauding the insurance company. The diseases listed included diseases of the **stomach, intestines** and **kidneys,** although the investigation file, which was right before counsel for the insurance company when he drew that petition, showed that the post mortem had revealed no such diseases. Nevertheless, it was alleged that said diseases contributed to cause Calhoun's death.

4. After the first petition was filed, and before the amended petition was prepared and filed, the deposition of the insured's attending physician was taken by the insurance company. He testified very positively that insured had none of the diseases mentioned in the original petition at the time of his death, and that such slight ailments as he had previously had did not in any wise contribute to cause his death. But in its amended petition the insurance company again set forth the entire list of diseases on which it had first relied, added one or two ailments thereto and alleged that **all** those things contributed to cause the death

of the insured. Nowhere in either the original or the amended petition was it alleged before trial of the equity case that the insured had aneurysmal varices in his esophagus and fraudulently concealed the same from the petitioner, although the insurance company had positive knowledge that its allegations concerning all diseases except the aneurysmal varices (if that could be called a disease) were entirely untrue.

Not until the case had been tried in the District Court did the defendant ask the Court's leave to amend its amended petition by setting up the existence of the aneurysmal varices as something which the insured fraudulently concealed and which caused his death.

5. At the trial of the equity case in September, 1936 petitioner learned that it had no proof whatever of any fraud on the part of the insured in concealing any condition or disease which in any wise contributed to cause his death; yet it put the widow to the expense of having a brief printed and sending a lawyer to St. Paul to argue the case on appeal to the United States Circuit Court of Appeals, which appeal it had taken without any reasonable ground to believe that it could reverse the decision of the lower court, having been shown in that court that it had no evidence whatever to justify cancellation of the policy.

6. On that appeal the brief of counsel for the widow showed so clearly that the policy should not be canceled that petitioner's counsel filed no reply brief, yet it went on with the appeal and argued the case vigorously. By such appeal the widow was obstructed in her attempt to collect the money due her from July 1, 1937, when the District Court decided the equity suit to July 13, 1938, when its judgment was affirmed by the Court of Appeals. The opinion of that Court was handed down on July 13, 1938, and held that under proper construction of the application for

insurance (which was ambiguous as above stated) there was no misrepresentation, either intentional or unintentional. The opinion of that Court was so unanswerable that the petitioner filed no motion for a rehearing, nevertheless it still vexatiously refused to pay from July 13th until October 6th, when it made an oral offer to settle the case by payment of the principal sum and interest at 6 per cent without damages or attorneys' fees.

7. The insurance company's excuse at the trial of the jury case for not paying, or offering to pay, the loss between July 13, 1938, and October 6, 1938, was that it was investigating a rumor that Etta Carey, a colored maid in the Calhoun home, had told somebody that she had testified falsely at the trial of the equity case and had been paid by insured's widow for so doing (Rec. Law pp. 17-181). The rumor proved to be groundless. This was no excuse for further delay, because (a) even if the witness had testified falsely at said trial proof of that fact would not have helped the insurance company, since there was no false representation, either intentionally or innocently made, in view of the ambiguity in the question in the application; and (b) in the summer of 1938 it was entirely too late for the insurer to offer any evidence to defeat the claim, for the policy had long since become incontestible. See policy (Rec. Eq. p. 39, incontestible after two years. It was issued January 30, 1934, page 29).

8. Thereafter nothing was done by the insurance company until October 19, 1938, when it filed an answer admitting liability for the full amount of the principal sum of the policy and interest to date at 6 per cent. The case stood in that condition until the trial, on November 15, 1938. So it appears conclusively that when the defendant started into the trial before a jury it not only had no de-

fense of any kind to the policy, but admitted in its answer that it was liable for the full amount thereof.

A general survey of all the foregoing facts certainly furnished a basis for the jury's finding of vexatious refusal to pay. The Missouri Supreme Court's decisions fully justified the opinion of the Court of Appeals in this case, holding that such question was one for the jury to determine.

In the case of Exchange Bank v. Turner, 321 Mo. 1104, 14 S. W. (2d) 425, l. c. 433, the Supreme Court of Missouri said:

> "Complaint is made also on the ground that the facts did not warrant the assessment for vexatious delay under Section 6337, R. S. Mo. 1919. It is true, as appellants says, that insurance companies, acting in good faith, may contest either issues of fact or law without subjecting themselves to the penalty of the statute; and there are some issues of law in this case about which lawyers might reasonably differ. Aufrichtig v. Columbian Nat. Life Ins. Co., 298 Mo. 1, 15, 249 S. W. 912; State ex rel. Gott v. Fid. Dep. Co., 317 Mo. 1078, 1095, 298 S. W. 83, 91. But the mere presence of a law question in the record will not of itself exculpate the defendant from a charge of willful obstruction if there is evidence that its attitude was vexatious and recalcitrant. Non-Royalty Shoe Co. v. Phoenix Assur. Co., 277 Mo. 399, 423, 210 S. W. 37, 43; Fay v. Aetna Life Ins. Co., 268 Mo. 373, 388, 187 S. W. 861, 865; Young v. Penn. Fire Ins. Co., 269 Mo. 1, 21, 187 S. W. 856, 861."

See, also:

Curtis v. Indemnity Co. of America, 37 S. W. (2d) 616, 327 Mo. 350;
Block v. U. S. F. & G. Co., 290 S. W. 429, 316 Mo. 478;
Keller v. Home Life Ins. Co., 198 Mo. 400, 95 S. W. 903;
Williams v. Ins. Co., 189 Mo. 70, 87 S. W. 499.

It follows that the opinion of the Court of Appeals, on account of which the writ is sought by petitioner herein, is not in conflict with the rule of law established by the highest court of Missouri, and, therefore, the writ should be denied.

Respectfully submitted,

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